Table of Contents

Executive Summary of the Comments of the Yellow Pages Publishers Association

The Yellow Pages Publishers Association ("YPPA") is submitting reply comments in the proceeding on the Commission's implementation of Section 222(e), availability of subscriber list information.

YPPA does not believe that the Commission must promulgate rules for Section 222(e), as the statute and legislative history are clear The comments filed in the proceeding do not support the need for Commission rules. Nevertheless, should the Commission promulgate rules, the Commission must allow as much flexibility as possible, in order to accommodate the different circumstances and requirements of different phone companies and directory publishers.

Should the Commission deem it necessary to clarify the terms of the statute, the Commission should closely follow Congressional intent. For example, some parties have asked the Commission to expand the clear statutory meaning of primary advertising classification. Only the primary advertising classification assigned at the time of the establishment of local service is considered subscriber list information under the statute.

Similarly, one party asked the Commission to expand the information contained in subscriber listings. The statute is clear that subscriber list information need only include listed names, numbers, addresses, and primary advertising classifications (at the time of the establishment of local service) that the carrier or affiliate has published or accepted for publication.

As noted in YPPA's initial comments. Congress mandated that rates for subscriber list information be reasonable and non-discriminatory. Two parties have asked the Commission to ignore Congressional intent and impose an incremental cost-based rate. Incremental cost-

based rates have been rejected by Congress, the courts and state commissions. There is no basis for imposing incremental cost-based rates for subscriber list information.

YPPA believes that the frequency of updates, timeliness, and the format in which subscriber list information is available should all be ruled by the principles of non-discrimination, reasonableness, and flexibility. The Commission should not mandate any specific frequency of updates, timeframes in which information should be transferred, or formats. If a telephone company gives the information to its own directory publisher at a certain time or in a certain format, an independent directory publisher should be able to get the same or similar information on a non-discriminatory and reasonable basis. If, however, the telephone company does not perform a certain function for its own directory publisher, such a providing subscriber list information in a camera-ready format, the telephone company should not be required, under the statute or under the Commission's rules, to perform that extra work for the independent publisher. The telephone company and directory publisher are free to negotiate for these services, but such service go far beyond the legal requirements in the statute.

Finally, one party attempts to argue that subscriber list information is an essential facility and, therefore, should be available on an incremental cost basis. First, case law and state commission proceedings do not support the conclusion that subscriber list information is an essential facility. Second, even, if somehow, the Commission concludes that it is an essential facility, the courts have only imposed reasonable and non-discriminatory pricing requirements -- and not incremental cost-based pricing -- for essential facilities.

As stated in YPPA's comments and in these reply comments, it is clear that rules for implementation of section 222(e) are not necessary. If, however, the Commission does wish to promulgate rules, the rules must be flexible to reflect and accommodate the differing conditions and requirements of different telephone companies and directory publishers. The plain language of the statute requires "nondiscriminatory and reasonable" rates, terms and conditions. The proposal that incremental costs be the only basis for listing prices has been universally rejected - by Congress, the courts, and state commissions. The Commission should not adopt an incremental cost model, should allow carriers and their directory publisher customers flexibility in negotiating rates, terms and conditions for the sale of subscriber list information, and should not dictate a "one-size-fits-all" solution.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	GN Docket No. 96-115
	)	
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	

To: The Commission

Reply Comments of the Yellow Pages Publishers Association

The Yellow Pages Publishers Association ("YPPA") by its attorneys, hereby submits reply comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. YPPA generally agrees with most of the comments filed in this proceeding regarding Section 222(e), availability of subscriber list information. There are, however, two very significant exceptions - the comments filed by the Association of Directory Publishers ("ADP") and the comments filed by MCI.

I. ADP AND MCI HAVE NOT CLEARLY DEMONSTRATED THE NEED FOR COMMISSION RULES

The Commission does not need to promulgate rules for section 222(e). The statute and accompanying legislative history is clear. ADP and MCI have asked the Commission to issue rules that are contrary to the plain language of the statute and that contradict Congressional intent. Neither has made a case as to why the Commission should promulgate rules under this section.

Additionally, the alleged abuses complained of by ADP in its filings with the Commission are, for the most part, five to ten years old, and YPPA does not agree with ADP's characterization of these practices. The new provisions requiring availability of subscriber list information are only a few months old, and there is no evidence that they are not working as intended. It is apparent, in the few instances cited by ADP in exhibits 6, 7 and 8, that some of ADP's members are evidently attempting to abuse the statute by asking telephone companies for items clearly not warranted by the legislation (e.g. asking for listings at incremental cost).[1/] The statute is clear. If a publisher believes a telephone company is refusing to provide subscriber list information, "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms and conditions," [2/] that publisher may file a complaint with the Commission under 47 U.S.C. § 208.

Should the Commission, however, determine that further rules are necessary, the Commission should permit as much flexibility as possible. As noted below, the Commission should also closely follow Congressional intent.

II. REASONABLE RATES, TERMS AND CONDITIONS DOES NOT MEAN UNIFORM RATES, TERMS AND CONDITIONS

ADP, at page 13 of its comments, attempts to argue for a national, uniform pricing policy. This is not supported by the legislation, or by facts. Indeed, states are not permitted to contradict the statute. But ADP argues that reasonable rates, terms and conditions should

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1/ See ADP Comments, exhibit 6, letter from David C. Henny to Mac MacGregor, page 2.

2/ 47 U.S.C. § 222(e)

mean the same thing in Maryland as it does in Virginia. If that were true, the price of local telephone service would be uniform throughout the country as well. The costs associated with gathering and maintaining subscriber list information may well vary from state to state and from telephone company to telephone company. A one-size-fits-all uniform rate will create situations where listings may be significantly underpriced (in relation to cost, market value, etc.) in some areas and overpriced in others. It is illogical that subscriber list information should necessarily cost the same in New York City as it does in Ada, Ohio.

III. IF THE COMMISSION PROMULGATES RULES, THE COMMISSION SHOULD PERMIT FLEXIBILITY AND FOLLOW CONGRESSIONAL INTENT

If the Commission, pursuant to paragraph 45 of the notice, determines there is a need to clarify the terms of the statute, the Commission should permit as much flexibility as possible to accommodate the different circumstances and requirements of different phone companies and directory publishers, and should closely follow Congressional intent. The Commission should not bow to the pressure of ADP and MCI and promulgate rules that go beyond the bounds of the statute.

A. PRIMARY ADVERTISING CLASSIFICATION

ADP, in its comments at page 18, alleges that "some telephone companies have adopted the evasive practice of delegating the responsibility for recording primary classification information to employees nominally employed by the telephone company's directory affiliate." ADP then urges the Commission to expand the words of the statute so that it would also include information gathered subsequent to the initiation of service by

employees of the directory affiliate. ADP cites no evidence for this unfounded allegation and no basis for its unwarranted relief.

The statute makes clear that only the primary advertising classification assigned at the time of the establishment of local service is considered subscriber list information under the statute. 47 U.S.C. § 222(f)(3)(A). Conversely, if the primary advertising classification information is not gathered by the telephone company representative at the time local service is ordered, it is explicitly not covered by the Act. Information gathered subsequently by employees of the directory publisher -- at the expense of the directory publisher -- is quite different than information gathered by the telephone company business office representatives at the expense of the ratepayer, and it is appropriately treated differently under the statute. This result is entirely appropriate, since the directory publisher is not utilizing telephone company resources to learn the new subscriber's primary heading (advertising classification).

ADP suggests that telephone companies must provide a free yellow pages listing. That is a matter of state regulation, and is irrelevant to the federal requirement, which is essentially one of non-discrimination. Where a telephone company collects the primary advertising classification at the time service is ordered, that information is part of subscriber list information and is covered by this provision. However, some telephone companies do not collect that information. If the telephone company does not collect and keep that information, the statute does not require that the telephone company perform this extra work.

B. Categories of Information Contained in Subscriber List Information

MCI, in its comments at pages 21-22 and attachment A ask the Commission to require a great amount of detailed information to be made available. This is not supported by the statute. Section 222(f)(3) defines subscriber list information as any information

> (A) identifying listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and
> (B) the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

MCI's request for such items as directory sections, community names, independent company names, the LEC's identifying notation, etc. is completely outside the bounds of the statute. The statute sets out all the legal obligations. If the carrier and the independent directory publisher wish to negotiate for additional services, categories of information, formatting, organization, or anything beyond the statutory requirements, that is up to the parties. Such items, however, should not be mandated by the Commission.

C. Timely Basis

YPPA agrees that subscriber list information should be available on a timely basis. YPPA does not agree, however, with specifying a particular time period for such availability. ADP, in its comments at page 22, suggest that all orders should be filled within 20 days. There is no statutory basis for mandating a specific time period. Some orders may take longer than 20 days, and it may be necessary for some orders to be filled in less time. It is hard to imagine a situation where a publisher would not be able to provide reasonable notice

to the telephone company. Each individual agreement between the companies should specify when such order will be filled. This is a matter between the telephone company and the directory publisher. This should be governed by the rules of reasonableness and non-discrimination.

D. NON-DISCRIMINATORY AND REASONABLE RATES DOES NOT MANDATE INCREMENTAL COSTS

Congress, the courts, and state commissions have all rejected incremental cost-based pricing for subscriber list information.[3/] ADP and MCI add nothing new to the debate, nor have they proven their case for incremental costs.

Affiliated directory publishers rarely, if ever, obtain subscriber list information at the incremental cost of providing the information.[4/] In fact, by requesting that the Commission mandate an incremental cost-based pricing scheme for independent directory publishers, ADP is seeking a competitive advantage over affiliated directory publishers, clearly undermining Congressional intent to create fair competition for directory publishing.

YPPA notes that, should incremental costs be utilized, the ratepayers will essentially be subsidizing directory publishers. The cost of maintaining the subscriber list information should be fully allocated to those using the information, including both affiliated and independent directory publishers, and the telephone company should be compensated for the

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[3/] See YPPA's comments at pages 7 to 11 and 13 to 15. In those comments, YPPA clearly demonstrated that incremental costs were rejected by Congress in passing section 222(e).

[4/] In some states, the provision of subscriber list information is governed by a local telephone company tariff, and is the same for affiliated and non-affiliated directory publishers.

value of the listing. Congress made that clear. The House Commerce Committee report is instructive in determining Congressional intent. It reads, in part:

> This section meets the needs of independent publishers for access to subscriber data on reasonable terms and conditions, while at the same time ensuring that the telephone companies that gather and maintain such data are fairly compensated for the value of the listings.

H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. at page 89 (1995) (emphasis added).

As noted below, YPPA does not agree that subscriber list information is an essential facility, and even where essential facilities are involved, the Courts have not mandated incremental cost-based pricing.[5/] The Commission must follow Congressional intent, and only require prices to be reasonable and non-discriminatory. The Commission must explicitly reject incremental costs as the only required basis for pricing subscriber list information.[6/]

[5/] *See* United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912).

[6/] Additionally, in footnote 3 (page 14) of his study attached to ADP's filing, Dr. Pflaum asserts that there is widespread acceptance of pricing subscriber list information at incremental cost. To support his theory, he cites the Economic and Monetary Affairs Committee of the European Parliament's April 1996 draft report embracing incremental costs. The Committee's final report in May, 1996, however, rejects incremental costs. The final report states "that new operators and entrants into the directories market should be given access to the names addresses and telephone numbers of telephone customers on fair, reasonable, and non-discriminatory terms..." (emphasis added). YPPA's comments clearly detail that incremental costs were also rejected by Congress, the courts and state commissions. YPPA comments at 7 to 11 and 13 to 15.

E. FREQUENCY OF UPDATES

MCI, at page 22 of its comments, suggests that subscriber list information updates should available on a daily basis. This may not be possible for some telephone companies. In addition, some directory publishers may not wish to pay the necessary premium to cover the added expense and value for daily updates. Once again, the concepts of reasonableness and non-discrimination should govern. If a telephone company chooses to provide daily updates, and a directory publisher needs daily updates. then those companies can negotiate to fulfill those requests.

F. FORMATS

ADP, in its comments at page 19, asks the Commission to require that subscriber list information be available in a "camera ready" format This request also goes far beyond the requirements of the statute. Many telephone companies do not provide the listing information to their directory publishers in a camera ready format. In addition, not all directory publishers desire listing information in camera ready format. If a telephone company chooses to provide listing information to anyone in a camera ready format, under the non-discriminatory requirements of the statute, the listings would be available to other directory publishers in that same camera ready format on non-discriminatory terms and conditions. In such event, the additional expense of converting the information into a camera ready format, and the additional value created by such a conversion, should be included in the price charged by the telephone company

G. For Purposes of Publishing a Directory

YPPA does not agree with ADP's contention at page 24 of their comments, that, even if a telephone company has a good faith reason to believe that a party is not using the subscriber list information to publish a directory, that the telephone company must nevertheless give the information to the party, and then proceed against that party at the Commission. This defies logic. First, once the party has improperly obtained the information, the damage has been done. This is closing the barn door after the horse has run off. Second, the party improperly obtaining the information is not likely to be subject to the Commission's jurisdiction. The Commission could impose no remedy, and grant an aggrieved party no relief.

On the other hand, should the telephone company reject a request made by a party, under the belief that the subscriber list information is not being used to publish a directory, that party can file a complaint at the Commission. The Commission does have jurisdiction over the telephone company, and, if the requesting party proves it intends to publish a directory, the Commission can fashion appropriate remedies.

YPPA also does not agree with MCI's contention at pages 23 and 24 of its comments, that a party requesting subscriber list information for the purpose of publishing a directory can also use that information other purposes.[7/] The statute makes clear that the legal obligation to provide subscriber list information is limited to providing the information for

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7/ Of course, once a directory is published, the white pages listings contained therein is in the public domain, and can be used for marketing purposes.

the purpose of publishing a directory. Companies should not be able to use that information to market local telephone services.

IV. ESSENTIAL FACILITIES

ADP spends much of their pleading attempting to convince the commission that subscriber list information is an essential facility[8/], and, therefore, should be available at incremental costs. Not only is ADP wrong about the classification of subscriber list information,[9/] ADP is also wrong about the remedy. Subscriber listing information is not an essential facility and ADP offers no legal support for its essential facilities contention. Furthermore, whether or not subscriber list information is considered an essential facility is essentially irrelevant, because there is no support for ADP's requested remedy - imposition of incremental cost-based pricing. In fact, it is a long standing judicial proposition that essential facilities must be provided to others on nondiscriminatory and reasonable terms and

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8/ Comments of ADP at pages 8-12 and Pflaum study attached to ADP comments at pages 7-8.

9/ Recently, the California Public Utility Commission (CPUC) specifically rejected ADP's attempt to classify access to subscriber list information as an essential facility. The CPUC concluded: "Access to the LEC's subscriber information database and provision of subscriber listings by the LEC is not an essential service." CPUC Decision 96-02-072, Conclusion of law 29, at p. 56.

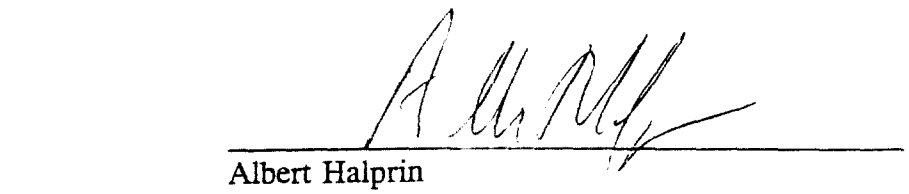
conditions -- not on an incremental cost basis.[10/] Indeed, the only proper remedy is already called for in the statutory provisions of section 222(e).

V. CONCLUSION

As stated in YPPA's comments and in these reply comments, it is clear that rules for implementation of section 222(e) are not necessary. If, however, the Commission does wish to promulgate rules, the rules must be flexible to reflect and accommodate the differing conditions and requirements of different telephone companies and directory publishers. The plain language of the statute requires "nondiscriminatory and reasonable" rates, terms and conditions. The proposal that incremental costs be the only basis for listing prices has been universally rejected - by Congress, the courts, and state commissions. The Commission should not adopt an incremental cost model, should allow carriers and their directory publisher customers flexibility in negotiating rates, terms and conditions for the sale of subscriber list information, and should not dictate a "one-size-fits-all" solution.

[10/] *See* United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912). In Terminal Railroad, an association of railroads controlled all access to the bridges crossing the Mississippi river at St. Louis. The court required railroads that are not members of the association to be permitted to use the association's terminal facilities "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." Id. at 411.

Respectfully submitted.



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June 26, 1996

CERTIFICATE OF SERVICE

I, Cathy L. McCoy, do hereby certify that a copy of the Reply Comments of the Yellow Pages Publisher Association, dated June 26. 1996, has been served via 1st Class, postage pre-paid, U.S. Mail, upon the following:

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